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No. 775

In the
Supreme Court of the United States
October Term, 1970

SCHOOL DISTRICT 151 OF COOK COUNTY, ILLINOIS, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered on September 8, 1970, affirming, as modified, the desegregation order entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entered on September 8, 1970, affirming, as modified, the permanent desegregation order entered by the District Court, is not yet reported, but is set forth in Appendix A. The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the preliminary desegregation order of the District Court (Judge Duffy dissenting) referred to by the majority opinion is reported in 404 F.2d 1125 (7th Cir. 1968), and set forth in Appendix B. The opinion of the District Court on the permanent desegregation order is reported in 301 F. Supp. 201 (D.C. Ill. 1969) and on the preliminary desegregation order in 286 F. Supp. 786 (D.C. Ill. 1968), and are also set forth in full with attached findings of fact and conclusions of law in defendant's appendix, Volume I, pages 30 and 87, filed herein as part of the transcript of record.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on September 8, 1970. No petition for rehearing has been filed. The jurisdiction of this court is involved under Title 28, Section 1254 (1), United States Code.

QUESTIONS PRESENTED

I. DOES A SCHOOL BOARD HAVE AN AFFIRMATIVE DUTY TO RE-DRAW NORMAL GEOGRAPHICAL SCHOOL ZONES, RE-STRUCTURE ITS EDUCATIONAL SYSTEM, SELECT SCHOOL SITES, AND BUS STUDENTS SO AS TO ALLEVIATE RACIAL IMBALANCE IN SCHOOLS

WHICH RESULTS FROM RESIDENTIAL HOUSING PATTERNS?

II. MAY A LOWER COURT PROPERLY BASE A FINDING OF RACIAL DISCRIMINATION UPON THE SUBJECTIVE MOTIVES OF INDIVIDUAL SCHOOL BOARD MEMBERS?

III. DOES THE EXISTENCE OF A PREDOMINANTLY NEGRO SCHOOL IN A BI-RACIAL SCHOOL DISTRICT CREATE A PRESUMPTION OF DISCRIMINATION WHICH CASTS THE BURDEN OF PROOF ON A SCHOOL BOARD TO SHOW ITS FREEDOM FROM RACIAL PURPOSE AS A DEFENSE?

IV. SHOULD THE "CLEARLY ERRONEOUS" DOCTRINE BE APPLIED WHERE IT APPEARS THE DISTRICT COURT HAS MECHANICALLY ADOPTED 120 PAGES OF VERBATIM FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDERS PROPOSED BY THE GOVERNMENT AND HAS DISPLAYED HOSTILITY THROUGHOUT THE TRIAL TOWARD DEFENDANTS AND THEIR EVIDENCE?

V. EVEN ASSUMING THAT RACIAL DISCRIMINATION HAS EXISTED IN THE OPERATION OF SCHOOL DISTRICT 151, DID THE DISTRICT COURT ERR IN FORCING THE SCHOOL BOARD TO ABANDON ITS NEIGHBORHOOD SCHOOL POLICY AND K-8 GRADE ORGANIZATION (DEPARTMENTALIZED) AND TO BUS MORE THAN HALF OF ITS STUDENT BODY, IN ORDER TO ACHIEVE INTEGRATION AT EACH OF THE SIX SCHOOLS IN THE DISTRICT?

VI. DID THE DISTRICT COURT'S BUSSING ORDERS VIOLATE TITLE IV OF THE CIVIL RIGHTS ACT BY REQUIRING THE ASSIGNMENT AND TRANSPORTATION OF STUDENTS TO ACHIEVE RACIAL BALANCE?

STATUTORY PROVISIONS INVOLVED

Title IV of the Civil Rights Act of 1964, Title 42, Section 2000C, et seq. USC, are involved and the relevant portions of the Civil Rights Act are appended to this brief in Appendix C.

STATEMENT OF THE CASE

NATURE OF THE CASE

This action is a school desegregation case brought by the Attorney General in the name of the United States, under Title IV of the Civil Rights Act of 1964, Title 42, Section 2000C-6(a)(b), U.S.C., against Cook County School District 151, its Superintendent and members of the School Board.

Preliminary injunctions hearings, over the defendants' strenuous objections, were held from June 19 through July 2, 1968. On July 8 and July 22, 1968, Judge Julius J. Hoffman, the District Judge, entered preliminary injunction orders which, in substance, required the defendants: to re-structure their school system by creating an upper grade center at the Coolidge School for all seventh and eighth graders; to bus those students attending Coolidge from grades 3-6 in stated percentages, to the other schools in the District, in order to integrate these schools; and to assign teachers involuntarily if necessary so as to achieve a certain racial mix at all of the schools. On December 17, 1968, the Court of Appeals affirmed the

preliminary injunction orders (Judge Duffy dissenting), without passing upon the defendants' contentions that the orders directed "hasty" and "ill-considered" solutions.

After hearing evidence on the Government's Motion for a Permanent Injunction for 19 trial days, Judge Hoffman entered a Permanent Injunction Order on May 15, 1969 which required a second conversion of the Coolidge Upper Grade Center for seventh and eighth graders and the Kennedy K-2 School, to a combined middle school for sixth, seventh and eighth graders; the bussing of the sixth graders to the combined middle school; and the bussing of the Kennedy K-2 Negro youngsters to various other schools. The Court of Appeals again affirmed (Judge Duffy dissenting) but modified the order so as not to require the forced bussing of the Kennedy K-2 Negro children.

STATEMENT OF FACTS

1. The Educational Pattern.

School District 151 is organized under the laws of the State of Illinois and located in the southeast portion of Cook County, Illinois. The District's boundaries are irregular and encompass the major portions of the cities of Phoenix and South Holland and a small portion of the City of Harvey. (1Tr. 153) ("1Tr." refers to pages of the transcript of record of the preliminary injunction hearing and "2Tr." to the permanent injunction hearing included in defendant's appendix being filed herein.) The City of Phoenix in the northwest corner of the District contains an almost exclusively Negro population. No Negroes presently reside, and none have ever resided, in any other portion of the District. (1Tr. 153, 175)

During the 1967-68 school year, the Coolidge and Kennedy Schools located within the City of Phoenix reflecting the residential pattern, were attended almost entirely by Negro students. (1Tr. 291) The other four schools—Taft in the southwestern portion of the District; Roosevelt in the approximate center of the District; and Madison and Eisenhower in the eastern portion of the District—had an almost exclusively White student body, with the following exceptions: For several years prior to 1967-68 the Board had been operating integrated educable mentally handicapped and trainable mentally handicapped programs (special education) at the Taft School, and also summer schools on a District-wide basis, attended by both Negro and White children. (1Tr. 157, 289, 291).

2. Geographic Zoning Policy.

A policy of geographic school zoning may be traced back nearly four decades. In the mid-1920's, the District was sparsely populated and largely a rural population. The City of Phoenix at that time was 95% White and 5% Negro. (Dft. Ex. 4, P. 24) All the District's students attended its only school, the Phoenix located in the City of Phoenix. (1Tr. 719) In 1931, the Roosevelt School was built, and two years later, the Coolidge School, constructed from the same plan as the Roosevelt, put into operation to replace the old Phoenix School. (1Tr. 269) All students living in the City of Phoenix, without regard to race, were assigned to the Coolidge School, (1Tr. 210, 243) which student body thereafter mirrored the existing racial housing patterns in the City of Phoenix. (1Tr. 154, 729) Other portions of the District were placed into the attendance boundaries for the Roosevelt School. (1Tr. 204, 206, 237, 1392, 1397-1399)

In 1948, the City of Phoenix was a predominantly White community, and student enrollment at the Coolidge School was approximately 70% White. (1Tr. 155) Within the next eight years, however, Negro migrations into that area, aided by a new subdivision west of the Coolidge School in 1954, drastically altered the housing pattern of Phoenix into an almost exclusively Negro community. (1Tr. 162, 242) Reflecting this change, the enrollment of the Coolidge School at the start of 1956-57 school year was approximately 99% Negro. (1Tr. 289-291) The attendance boundaries, though first put into written form in 1964, remained the same throughout this period. (1Tr. 220, 1397)

For a period lasting from the late 1920's to the early 1940's, approximately two dozen children living on 153rd Street (also known as 157th Street) between State Street and Van Drunen Road, attended the old Phoenix School and, after its opening, the Coolidge School. Their homes, though in the Roosevelt attendance area, were situated closer to the Coolidge School. Since the early '40's, the two children of Jasper Trump were the only ones from this vicinity attending the Coolidge School. (1Tr. 720-722, 729-731, 1399) In 1956, these two children transferred to the Roosevelt School because of a dispute between Mr. Trump (at that time Secretary of the School Board) and the principal of the Coolidge School. (1Tr. 257, 730) No other transfers between the Coolidge and Roosevelt Schools have ever taken place. In the same year several Negro children living in the City of Phoenix were denied permission to transfer from Coolidge to Roosevelt School.

Beginning in the 1940's when the Coolidge School was predominantly White, students were bussed from the so-called triangle area south of the City of Phoenix to the

Roosevelt School. (1Tr. 196-197) This bussing continued until the construction of the Taft School to serve that area in 1966. In the late '50's, children living in the Roosevelt attendance zone, west of the C&EI tracks and east of Van Drunen Road, began to be bussed to the Roosevelt School. During the period of bussing, no White students from the City of Phoenix were ever bussed to the Roosevelt School. (1Tr. 243) The Coolidge School, prior to 1962 (1Tr. 196-198) and from 1962 to 1965 (1Tr. 264-265, 335, 409-410, 1210-1212, 2Tr. 2091-2093) could not have accommodated the students from these areas.

3. Construction of Schools.

During the period from the mid-1940's through May of 1968, the school population of the District grew from approximately 400 pupils in two buildings, to more than 2600 pupils in six buildings. (Govt. Ex. H-1, P. 28) Because of an inadequate bonding power, this rapid growth severely taxed the District's ability to provide the needed classrooms and, from 1953 to 1961, the District only built enough room additions to satisfy the most pressing attendance needs. (1Tr. 197-198, 1403-1404)

By 1962, both Roosevelt and Coolidge were again severely overcrowded. Class sizes reached 37 and 38; and makeshift rooms were created in the basement. (1Tr. 264-265, 335, 409-410, 1210-1212, 2Tr. 2090-2091. See pictures, Dft. 67-72) To rectify this situation, Mr. L. K. Watkins, the only Negro member of the School Board and a resident of Phoenix, proposed that a new school be built in the Harvey Highlands, the area north of Route 6 and east of the C&EI tracks to accommodate the overflow of Negro students from the Coolidge School and White students from the Roosevelt School. (1Tr. 335, 346, 362, 365) A majority of the Board approved this plan and

agreed to present a bond referendum to the voters, as required by Illinois law, in February of 1964. (1Tr. 346, 361-362, 365, 372-374) Although strenuously supported by the Board, the referendum failed by a vote of 1,059 to 418. (1Tr. 426, 431) Negro residents of Phoenix voted almost 20 to 1 against the proposed integrated school. (Dft. Ex. 42)

A second proposal was approved by a referendum held in December of 1964. This plan called for the expenditure of $935,000 on the erection of a new school at the Taft site and additions to the Coolidge, Eisenhower, Roosevelt and Madison Schools, and an increase in the educational tax rate to 86¢. (Dft. Ex. 42) Mr. Watkins supported this proposal. (1Tr. 398, 485) The Taft School was completed and occupied by the fall of 1966. The Kennedy School, designed for primary grades and originally conceived as an addition to the Coolidge School, was never attached because of a shortage of funds to complete the project. This financial condition also caused the Board to delay construction of $140,000 of the Kennedy School improvements for one year. (2Tr. 2026-2032, 2034) The other additions proposed in the referendum have not, as yet, been built.

4. The Events of 1967-1968.

In early 1967, Health, Education and Welfare officials completed their investigation into charges similar to those in the case at bar, and concluded (Dft. Ex. 55):

> "There is no evidence of gerrymandering of the Coolidge-Kennedy boundaries, as these zones are the same as they were when the school was predominantly White . . . this situation seems to be a classical de facto segregation situation . . ."

School officials were informed of the results of this HEW investigation. (1Tr. 1232-1242).

In December of 1967 a referendum to increase the educational tax rate 21¢ was overwhelmingly defeated 1115 to 477 votes. (Dft. Ex. 42)

Shortly thereafter, in an effort to formulate a written policy with respect to the operation of the District's schools, Dr. Watts submitted four alternative plans to the Board. (1Tr. 759-761) Two of the plans, A and D, designed only to relieve overcrowding, called for no substantial change in the geographic zoning policy. Plan D was also the only plan in which no building was contemplated. (1Tr. 761-76) Plan B would have established an upper grade center at the Roosevelt School for seventh and eighth grade students from the Roosevelt, Madison and Taft areas, and also added certain classrooms. The last, called "Plan C", which he favored would have established an upper grade center at Coolidge for all seventh and eighth grade students in the District. Students formerly attending Coolidge would be bussed to the other four schools in the District to racially balance these schools. (1Tr. 775) As presented to the Board by Dr. Watts, Plan C contemplated spending $245,000 for remodeling and renovating existing facilities. The money was to be raised by the sale of the bonds previously approved in the December 1964 referendum, but unissued. (1Tr. 881, Plt. Ex. L-3)

Board Members generally approved the idea of an integrated, District-wide upper grade center (1Tr. 905, Dft. Ex. 119), but there were several objective drawbacks to Plan C: An optimum upper grade center would require many curriculum changes which could not be achieved without considerable expense; the District had an insuffi-

cient educational rate to sustain a truly effective upper grade center program (1Tr.1073-1075; 1370, 534, 1248, 1311, Plf. Ex. O-8, P. 42; Plf. Ex. O-5, Pp. 21-25); the Coolidge School was an inadequate facility to carry on an upper grade center program; (2Tr. 264, 271, 293, 687, 949-951, 959, 2146-47, 2256, 3597-2598) it had no facilities for home economics, industrial arts, special facilities for art or music; the science room had been burned out and it was unavailable for the first six months of the school year; it had inadequate gym facilities, no working shower facilities or locker room facilities, the counselling and administrative offices were inadequate; and the grounds questionable; (Dft. Ex. 63, 1Tr. 829) all of the District's accumulated bonding power would be exhausted, if this plan were put into effect, precluding the possibility within the near future of a centrally-located upper grade center which Dr. Watts admitted was preferable; (2Tr. 2138, 2152) and the location of Coolidge in the corner of the District would maximize the need for bus transportation. (2Tr. 2137, Dft. Ex. 117, 118)

At their February, 1968 meeting, the Board in a 4/2 vote (1 member absent) voted to adopt Plan D. (Dft. Ex. 128, pp. 27-28, 30; Plt. Ex. F-7, p. 147; 2Tr. 2138). Two weeks later, at the written request of Dr. Watts, the Board voted to rescind its approval of Plan D. (Plt. Ex. O-7, P. 32; 1Tr. 534, 783, 784, 896, 1073-1074) In his written memorandum, no further mention was made of Plan C, and the Board was urged by Dr. Watts to adopt a firm commitment now and plan to carry out necessary bond referendum and site selection steps leading toward the first phase of a new "centrally located District upper grade center ready for September 1971." (1Tr. 869-873) This and the other recommendations of the superintendent outlined in the memorandum were carried out by the new Board elected in April of 1968. (1Tr. 869-873; Dft. Ex. 42)

5. Financial Status And Bussing Under The Court's Orders.

In the first full year under the Upper Grade Center ordered by the District Court, the School Board was required to borrow a total amount of $510,000.00, as compared with a total amount borrowed in the prior year of $260,000.00—or an increase in the Upper Grade Center Program of $250,000.00. Four straight attempts to increase the educational rate to provide much-needed educationl improvements have been defeated by the voters, the last one by a 2 to 1 margin. The number of students being bussed has increased from several hundred students to over one thousand students, while the cost of this bussing has quadrupled from $15,000.00 to over $60,000.00*.

Approximately 20%-25% of the student population has transferred out and are now attending private or parochial schools in the area which, in 1967, accounted for 30% of the district's elementary age children. (Government Ex. H-1, p. 24). Comparing the present attendance (approximately 2,000) with the 1967 Survey Team projected enrollment for 1970 of 3,130 students (Government Exhibit H-1, p. 28), reveals more than a 33⅓% drop, indicating that, in addition to transfers, there has been a sharply reduced enrollment of new students. This reduction has resulted in a loss of State Aid, which is based upon average daily attendance.

The percentage of Negro students has also risen in this period from 30% to approximately 38% of the district's enrollment, indicating that about 85%-90% of those leaving have been White students.

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* The Court of Appeals statement that the "additional bussing costs expected under the order is $15,000.00", (App. A) refers only to the additional bussing costs over and beyond that incurred by reason of the Preliminary Injunction Order.

REASONS FOR GRANTING THE WRIT

1. Racial Imbalance And The "No Affirmative" Duty Rule.

This case illustrates the urgent need for a definitive statement from this Court as to whether School Districts in the North have an affirmative duty to alleviate racial imbalance stemming from residential housing patterns, and, if so, the extent of this obligation. In the 1960s, in a series of decisions beginning with *Bell* v. *School City of Gary,* 324 F.2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924 (1964), the Courts of Appeal for the Seventh, Sixth and Tenth Circuits interpreted the *Brown* decisions as casting no duty upon school districts in the North to integrate their schools, or to alter the normal geographic attendance boundaries or make other changes because of the existence of both predominantly White and predominantly Negro schools within the District. See *Downs* v. *Board of Education of Kansas City,* 336 F. 2d 988 (10th Cir. 1964) cert. den. 380 U.S. 914 (1965); *Deal* v. *Cincinnati Board of Education,* 369 F. 2d 555 (6th Cir. 1966) cert. den. 389 U.S. 847 (1967); See also *Springfield School Comm.* v. *Barksdale,* 348 F. 2d 261, 264 (1st Cir. 1965).

In the *Deal* case, the Court of Appeals for the Sixth Circuit reiterated that it was only classifications "solely on the basis of race" which violated the equal protection clause of the 14th Amendment. Other classifications, it held, such as geographic districting were permissible. (369 F. 2d at p. 60) The Court also rejected the contention there advanced (essentially identical to that accepted by the District Court below):

> "That it is harmful to Negro children to attend a racially imbalanced school, and this fact alone deprives them of equal educational opportunity." (369 F. 2d 58)

See also Kaplan, Segregation Litigation in the Schools—Part II: The General Northern Problem, 58 Northwestern University Law Review 157 May-June, 1963, at Pages 174 and 175.

The majority opinion in the case at bar ostensibly recognizes the validity of these opinions, but announces that they are not controlling here, "where the segregation has been found to be de jure, . . ." But this is a label—not a distinction—belied by uncontradicted facts. As Judge Duffy notes in his dissent, there is no evidence here, that the School Board's actions "established" Coolidge School as a predominantly Negro school. Indeed, the majority opinions in both Appeals concede that the sole cause of the change in the racial makeup in this school was the transition of the Village of Phoenix from a predominantly White to an all-Negro community during the period 1948 through 1956. The separate housing patterns in the City of Phoenix—which is now all-Black, and in the communities of South Holland and Harvey which are all-White—have remained static since 1956. Given these residential housing patterns and the fact that the 1964 and 1966 attendance resolutions made no change in the Coolidge-Roosevelt School boundary, it is apparent that without saying so, the majority opinion has substantially repudiated the "no affirmative" rule of *Bell* and its "progeny". The net result is to leave School Board members, uncertain as to how far, if at all, attendance boundaries must be redrawn, to meet their constitutional obligations.

The same is true of the issue of bus transportation. The gist of the two majority opinions appear to be that once space was available at the Coolidge and Kennedy Schools, the School Board was under an affirmative obli-

gation to achieve integration by changing the existing bussing patterns which began in the early 1940s when no racial purpose existed, and when the City of Phoenix was predominantly White. Again, this is fastening upon the School Board an affirmative duty to take action to alleviate racial imbalance which it did not originally cause, without defining the extent of this obligation or at what point in time it arose.

2. The Inquiry Into Subjective Motives Of School Board Members.

With respect to the "educational structure" of the District, the lower Courts accepted the Government's argument that while the Constitution did not require the School Board to adopt former Superintendent Watts' Plan C, and that many "non-racial" reasons may have existed for rejecting the Plan, nevertheless, the Board's non-adoption of this Plan on account of the "hostility of the residents of the District to desegregation", was constitutionally impermissible.

In the first place, the use of the term "desegregation" is confusing, because as noted earlier we are dealing with racial imbalance caused by residential housing patterns. Secondly, constitutional standards should not be based upon psychological motivations of School Board members, whether they be proper or improper, but upon the objective evaluation of actions and their effects. If a School Board is under no constitutional obligation to adopt an upper grade center, in order to alleviate racial imbalance, then the subjective motivations of individual Board members in failing to vote for such a change are immaterial.

The majority opinion's error is in failing to observe the distinction between subjective motive and objective

purpose. In *Griffin* v. *County School Board,* 377 U.S. 218, 231-232 (1964), relied upon by the Majority opinion, racial purpose was determined from an objective evaluation of the statute and its effects, not upon the subjective motivations of the legislators.

Here, in establishing "racial purpose" legislative motives were repeatedly examined, going beyond objective criteria in an attempt to discover the state of mind of the School Board members when they took certain action. Such an approach has been consistently rejected by this Court. See *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810) (involving a State Statute where this Court first announced its refusal to inquire into legislative motives); *States* v. *O'Brien,* 391 U.S. 367, 383-384 (1968), where the Court re-affirmed this rule and specifically rejected the contention that *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960) relied upon by the District Court here, stood for the proposition that "legislative motive is a proper basis for declaring a statute unconstitutional"); and Justice Cardozo's dissent in *United States* v. *Constantine,* 296 U.S. 287, 298-299 (1935). See also *Deerfield Park District* v. *Development Corporation,* 22 Ill. 2d 132 (1961) where the Illinois Supreme Court treated Park Board members as "legislators" and, in the process, rejected an attempt to show that their subjective motive in acquiring land by condemnation, was to prevent residential integration.

The principle announced in these cases is supported by sound, judicial policy. Inquiry into the legislators' motives, as was undertaken in the case at bar, offends the separation of powers by impugning the integrity of the political process itself, and allows the Court to intrude in the give and take of politics and to pass judgment on the legitimacy of political pressures and

the responses to them. Moreover, there are other practical considerations which preclude an examination of motive. The School Board is not a monolithic body. Superintendent Watts noted, in the space of one year, he dealt with twelve differen individual people who had been members of the seven-member School Board. (1Tr. 779) Furthermore, individual School Board members generally have different reasons for supporting particular decisions. Direct evidence of motivation where it exists at all, will generally be limited to the motives of a few of the more vociferous members, as it was in the case at bar, and it is error to impute these motives to the entire, or even a majority of the Board.

For example, with respect to the site selection for the Kennedy School in 1964, the majority opinion cites the testimony of one Board member "that he took into consideration in the proposal subject of the referendum 'the effect of an integrated school I felt would have an effect on the passage of the bond issue'" to sustain the findings that the site was selected "to promote and preserve the racial segregation of students in School District 151." (Findings, 22, 23, Dft. App. Vol. I, pp. 108-09)

The purpose of the plan adopted was to build a new school and relieve overcrowding at the Roosevelt and Coolidge Schools, as the Board's submission a few months earlier of a referendum which would have created a single new integrated school showed. The fact that the first plan to be submitted to the voters had been defeated (by a majority of the voters throughout the District, including the Village of Phoenix) indicates the Board was facing two horns of a dilemma: (1) to refrain from submitting another plan for referendum, and thus maintaining the status quo with respect to the racial com-

position of the schools and with respect to the quality of education available therein, or (2) re-drawing the referendum issue in a manner which retained the status quo for racial composition, but improved the quality of education by relieving the overcrowded facilities.

To be sure, certain individual Board members may have voted to accept the December referendum, rather than another proposal, in part on the basis of their belief that voters might reject a plan which altered existing (legal) boundaries, but such vote goes to the knowledge and motives of those members in choosing the plan based upon the assessment of its likelihood of success—but not to the purpose of the proposal itself.

Under these circumstances, it is incredible that a Court should accept the Government's proposition that the choice here made reflected a collective purpose to deny the children of the Village of Phoenix, equal educational opportunities. With characteristic hindsight, the Government undoubtedly would have found the same illegal purpose, had the Board refused to submit another referendum.

3. The Presumption Of Discrimination.

The presumption of discrimination in Conclusion of Law 12, sustained by the majority opinion, is irreconcilable with the rules announced in the *Bell* and *Deal* cases. In practically every large, Northern city, residential housing patterns are such that no method of geographical districting could be devised to secure complete integration. Thus, a literal application of the rule applied in the case at bar would make geographical districting in every one of these cities presumptively invalid, and would swallow the rule of the *Bell* case.

In *Wright* v. *Rockefeller,* 376 U.S. 52 (1964), this Court held that such a presumption did not exist in the case of electoral districting. The plaintiffs there showed that three of the four congressional districts in New York County contained substantially all of the Negro voters, leaving one district almost exclusively White and another predominantly Negro. Though defendants offered no evidence in rebuttal, the three-judge District Court held that plaintiffs had not met their burden of proving that the districting was based on racial considerations. This Court affirmed. There is no compelling reason why this principle should not apply equally to school districting.

The case at bar is unlike the situation which existed in *Turner* v. *Fouche,* 38 L.W. 4090 (1970), relied upon by the majority opinion. While the inference of discrimination is proper in *Turner,* where a jury list should ordinarily substantially reflect the percentage of Negro residents in the County, the same is not true with respect to the existence of a predominantly Negro student enrollment. The inevitable effect of non-integrated residential patterns, whatever the reasons for their existence, have been to produce corresponding school attendance patterns, without any need for official action. Thus, on a purely statistical basis, the existence of a predominantly Negro school in a bi-racial school district is of no probative value in showing any official acts of discrimination, and it is irrational to impose a contrary presumption. Nor is the presumption aided by the findings on the preliminary injunctive hearings which, in turn, were based upon a similar presumption of discrimination. (See Conclusion of Law 10, Preliminary Injunction, Dft. App. I, P. 60)

Furthermore, in many areas of the law, there exists a presumption contrary to that assumed by the District

Court. Namely, the presumption of regularity; and, more particularly, where constitutional issues are involved, the presumption of constitutionality. These presumptions militate against placing an artificial burden upon state officers who are accused in a Federal Court of having violated the Federal Constitution.

4. The District Court's Bias And Prejudgment Of The Case.

It is the duty of the Trial Court to maintain, throughout the trial, an atmosphere of open-mindedness and impartiality. The record below is replete with the Trial Court's flagrant abuse of this obligation and its prejudgment of the merits of the case.

On July 8, 1968, the District Judge adopted, verbatim, the 26 pages of findings and conclusions, and the 6-page order submitted by the Government. On May 15, 1969, the District Judge again accepted, without changing a word, the Government's 73 proposed findings of fact, 33 proposed conclusions of law, and the Government's proposed order, all of which total some 97 pages.

This mechanical adoption of the successful attorney's proposed findings was severely criticized by this court in *United States* v. *El Paso Gas Company,* 376 U.S. 651, 656-657 (1964). The District Court's disregard of this Court's admonition in a racial desegregation case should, by itself, call for the exercise of this Court's supervisory powers.

But in addition, the record, here, is filled with examples of the District Court's repeated cross-examination of Defendants' witnesses, many times in a caustic and unfair manner: (1Tr. 249-52, 269, 271, 303-04, 318-23, 1045-48, 1314-20, 1376, 1416, 1439-41, 2Tr. 85, 901-02, 956, 984,

998-1001, 1071-75, 1011-12, 1063, 1080-82, 1436-37, 1476-77, 1533-37, 1663-66, 1736-37, 1892-93, 2428-30); sarcasm towards defendants' counsel (1Tr. 17, 46, 340, 932, 938-41, 2Tr. 641, 893, 1228-29, 1565-67, 1657-59, 1729, 1938, 2121, 2218-19, 2493, 2690; Tr. 6-6-69 P. 24-26); and reliance upon social and educational theories derived from independent research in anticipation of this trial (2Tr. 2716-17, 2722, 2828-29, see also 1Tr. 474-75, 945-48, 2Tr. 621, 1288-90, 2204-05, 1Tr. 605-06, 832, 938-42, 2Tr. 1433-34) (The latter constitutes a denial of due process, see *Ohio Bell Telephone Co.* v. *Public Utilities Com.*, 301 U.S. 292, 302-303).

We submit that this mechanical adoption of 120 pages of verbatim findings and conclusions of law proposed by the Government, and the adoption without change of the proposed judgment orders submitted by the Government, coupled with the hostility to defendants displayed throughout the trial, compels a conclusion that the District Court prejudged the case. Under such circumstances, the majority opinion erred in applying the "*clearly erroneous*" doctrine and in relying upon such findings to distinguish the *Bell* case.

5. The Propriety Of The Mandatory Injunctive Relief And The Prohibition Of Bussing Contained In The 1964 Civil Rights Act.

Even assuming that racial discrimination has existed in the operation of School District 151, the question remains whether the lower Courts erred in the scope of the mandatory injunctive relief granted the Government. As Judge Duffy noted in his dissents, the Government's argument that the bussing of 55% of the total student body of the District is only "incidental" to the

establishment of unitary schools in this system, cannot be sustained. (See Findings 36, 65) The Plans submitted by HEW, advocated by the Government, and accepted by the Court, were drawn, not to achieve a "unitary school system", but to overcome the effects of residential or de facto segregation and to integrate the student bodies of each of these six schools in the District. HEW, in preparing its report, did no financial analysis (2 Tr. 692) gave no consideration to the possibility of utilizing the Taft School as an upper grade center for 7 and 8 grades, or to the possibility of redrawing its neighborhood attendance boundaries with a majority to minority transfer plan, or to the adoption of a centrally-located upper grade center. (2 Tr. 563-565, 652, 2602-03, 2607) The only plans the Government did consider involved the bussing of the Coolidge and Kennedy children to other schools in the District in order to achieve "maximum desegregation". (Govt. Ex. RRR, P. 6, 2 Tr. 2226) Theron Johnson, the Government's desegregation expert, conceded as much, when he testified that "this District cannot be desegregated without transportation". (2 Tr. 570) Commenting on the availability of his so-called 'desegregation' options, he testified" (2 Tr. 564):

> "For example, School Districts will re-draw attendance areas. When one views where children live by color in the district, and that is an option which is just not available."

He testified that they rejected pairing of schools because: (2 Tr. 565)

> "Well, facilities where the buildings are placed don't match out right. If that option were used, you would have a number of buildings which would essentially *still be all-White and only one building would have*

> *a possibility of any desegregation to it, or two buildings.*" (Emphasis added)

But, Mr. Johnson erroneously assumed that the establishment of a unitary school system requires maximum integration at every school in the District, and that there can be no acceptable plan where there remains any predominantly White or predominantly Negro schools in the system. (Such an assumption is contrary to the President's policy statement on school desegregation announced on March 24, 1970, incorporated in Defendant's App., Vol. I, Page 218a).

The Trial Court took the same position. In rejecting the plan originally submitted by the defendants for the Coolidge School, it said:

> "The integration provided for in the body of the original plan was confined to only one of the four until now predominantly White schools to the eighth grade." (Tran., July 26, 1968)

Moreover, the District Court specifically ordered that the children of the Coolidge School "be distributed among these four schools (Madison, Eisenhower, Roosevelt and Taft), to as to "maximize the disestablishment of the racial identifiability of all District 151 schools." (July 22, 1968, Order, P. 3) and required bussing by the Board in order to achieve a certain "racial makeup of each school". (July 22, 1968, Order, P. 3-4) Moreover, in its May 15, 1969, Order, (Par. 8 C) the District Court assigned certain blocks in the City of Phoenix to each of these four schools and ordered the students residing in these blocks to be bused thereto, thereby insuring that the student bodies at the Madison, Eisenhower, Roosevelt and Taft Schools would be substantially integrated.

As Judge Duffy notes in his dissenting opinion, it was congressional opposition to this very kind of bussing—out of the neighborhoods in order to overcome separate housing patterns—which lead to the prohibition of bussing contained in the 1964 Civil Rights Act.

The legislative intent and the language used leave no doubt that Congress intended to recognize geographic districting and did not foresee changing this method of pupil placement on the basis of relief which would be granted in suits brought under the Act. Desegregation is specifically defined in the Act as:

> "The assignment of students to public schools and within such schools *without regard to their race, color* . . . and shall not mean the assignment of students to public schools *to overcome racial imbalance.*" 42 U.S.C., Section 2000C(b) (Emphasis added)

Senator Humphrey's statements on the floor of Congress with respect to this provision clarifies and makes plain the Congressional intent. He said: (110 Congressional Record, p. 12714)

> "This addition seeks simply to preclude an inference that the Title confers new authority to deal with 'racial imbalance' in schools, and should serve to soothe fears *that Title IV might be read to empower the Federal Government to order bussing of children around a city in order to achieve a certain racial balance or mix in schools.*
>
> Furthermore, a new Section 410 would explicitly declare that 'nothing in this Title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.'
>
> *Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not*

be affected by Title IV, so long as such classification was bona fide." (Emphasis added)

There are sound reasons for this Congressional policy. Neighborhood schools are deeply entrenched institutions with many obvious advantages. Involuntary transportation of pupils out of their neighborhoods is opposed by a great number of parents—both Black and White. The majority opinion recognizes these factors but only with respect to the Black K-2 children*. Yet the forced bussing of the Black 3-5 or the White 6-8 students out of their neighborhoods is no more palatable in principle or in practice.

Moreover, educators, teachers and parents are in disagreement as to whether the 6th graders should be included in a middle school or whether an inadequate upper grade center such as Coolidge is preferable to a K-8 organization which is departmentalized. (See author cited in defendants' Exhibit 126 and 127, id; 2Tr. 1124, 1163-64, 1250-51, 2250, 2313). The Federal Courts have neither the requisite background, nor the technical competence to make such educational decisions. When they order a community to abandon neighborhood schools and to adopt an upper grade center or middle school in the name of integration, without provisions for adequate funding

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* The majority opinion's suggested distinction of the case of *Swann, et al.* v. *Board of Education,* 39 L.W. 3364, docket #281349 in this Court, based upon the size of the School District, should not be accepted by this Court. Compared to available resources, bussing 55% of the student population of a small district more probably than not poses just as great a financial burden as busing such a percentage of students in a larger district. More importantly, is it right to require parents living in a small district to submit to a kind of bussing that is disagreeable to them, when such bussing is not being imposed on parents living in larger school districts who would also dislike it?

thereof, their efforts are largely self-defeating. Such orders breed resentment and resistance, rather than concern and cooperation. In the long run, racial harmony and quality education cannot succeed in such an atmosphere. School District 151 is a case in point.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17754 SEPTEMBER TERM, 1969 APRIL SESSION, 1970

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SCHOOL DISTRICT 151 OF COOK COUNTY, ILLINOIS, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

SEPTEMBER 8, 1970

Before SWYGERT, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and KILEY, *Circuit Judge.*

KILEY, *Circuit Judge.* This is the second appeal in this proceeding by the United States Attorney General[1] for desegregation of School District 151 in Cook County, Illinois. In the first appeal we affirmed, 404 F.2d 1125, the preliminary injunction order substantially implementing desegregation Plan C proposed by the District 151 Superintendent of Schools. 286 F.Supp. 786. Upon remandment for hearing upon the government's application for a permanent injunction, the district court conducted a hearing from January 13 to February 17, 1969, adopted the government's desegregation Plan I and ordered defendant Board to implement that Plan. 301 F.Supp. 201.

[1] 42 U.S.C. § 2000c-6(a) and (b).

The Board appealed. We affirm, with one modification of the order.[2]

We refer to the three decisions, above cited, for the detailed geographical and political description of the 4-½ mile square school district and the demographic development of the racial patterns which prior to 1964 had made Coolidge School in the city of Phoenix entirely Negro, and Eisenhower, Madison and Roosevelt Schools outside of Phoenix non-Negro. *United States v. School District 151 of Cook County, Illinois,* 286 F.Supp. 786; 301 F.Supp. 201; and 404 F.2d 1125. The common holding of these three opinions was that the policies, practices and decisions of the School Board members have been based upon unconstitutional racial discrimination depriving Negro pupils of equal protection of the law in violation of the Fourteenth Amendment with respect to the drawing of attendance zones, pupil and teacher assignment, busing of pupils and selection of sites for additional schools.

At the conclusion of the hearings on remand, the district court, having found unlawful discrimination in the above-mentioned respects, permanently enjoined the Board from continuing its discriminatory practices, policies and decisions. It further ordered the Board to convert the Coolidge-Kennedy school complex into a combined upper grade center for all sixth, seventh and eighth grade pupils in the District and to bus White pupils in these grades to Coolidge-Kennedy; and to bus Kennedy-Coolidge kindergarten to fifth grade pupils (K-5) to various other schools in the District.[3]

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[2] At oral argument this court, with agreement of the parties, held decision under advisement pending negotiations between the parties toward a constructive settlement of the issues. We expressed impatience at the intransigent positions of the adversaries and the continued arguments directed at justifying each party's position at the expense of the other's, with the important legal-racial and pupil-parent interests lost sight of. After several weeks during which the parties exchanged, criticized and finally rejected proposals, a Joint Report of failure of settlement was made to the court and is now of record before us.

[3] The desegregation of teachers has been completed and the district court has retained jurisdiction to pass upon the location and construction of new schools in the District. We need not, therefore, deal further with these aspects of the district court's injunctive orders.

A comparison of the arguments in the first appeal and in this appeal shows clearly that for the most part defendants have arrayed against the permanent injunction substantially the very arguments that were leveled against the preliminary injunction and which were rejected by this court. We are not disposed to rehash in this opinion the decisions made in our first opinion.[4] We further find unworthy of discussion in this opinion the Board's contentions that the district court had erroneous views of the applicable law which infected the proceedings with error, or that the court's questions put to witnesses showed bias, or that the court denied the Board a fair opportunity to present its case or denied it due process by introducing the original findings into the record instead of considering the application for permanent injunction *de novo*. Nor shall we discuss the fact findings which defendants challenge generally on the basis of testimony of Board witnesses which the district court was not compelled to accept as true, in view of the objective facts as to which there can be no controversy.

We turn then to the findings of fact of the district court which have been specifically challenged by the Board on this appeal. These are findings of fact Nos. 16-20 dealing with busing, Nos. 21-23 relating to the selection of new sites and the construction of new schools, Nos.

[4] Briefly, and so far as still relevant to the present appeal, our opinion sustaining the preliminary injunction established that *Bell v. School City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. den.* 377 U.S. 924 (1964), and its progeny, including *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. den.* 389 U.S. 847 (1967), are not controlling here, where the segregation has been found to be *de jure*, since *Bell* "presupposes an 'innocently arrived at' de facto segregation with 'no intention or purpose' to segregate Negro pupils from White." 404 F.2d at 1130. Further, as to the drawing of attendance zones, we found *Taylor v. Board of Education*, 294 F.2d 36 (2d Cir.), *cert. den.* 368 U.S. 940 (1961), indistinguishable in principle since "in both cases, the Board was found to have drawn lines to effectuate and perpetuate a purposeful, discriminatory condition, and race was made the basis for school districting with the purpose and result of segregating public schools." 404 F.2d at 1132. Concerning the restructing of the School District, we approved the finding of the district court that the Board rejected a proposed plan that would have eliminated the effects of past discrimination because of the Board's and the community's opposition to the desegregation that would have resulted from its implementation. We rejected, on the basis of *Griffin v. County School Board*, 377 U.S. 218, 231 (1964), the Board's contention that the government's reliance upon the psychological motivations of the Board to establish the unconstitutionality of its conduct was improper.

24-34 dealing with the drawing of attendance zones, and Nos. 35-38 with respect to the restructuring of the School District. These findings underlie ultimate finding of fact No. 39 and form the basis for conclusions Nos. 11 and 13. Each specific finding of fact states the relevant objective facts, and each group of findings ends with the inference that the purpose and effect of the pertinent policies and decisions of the Board either wholly or partially were based on the purposeful segregation of pupils in the District on the basis of race.

In view of the extensive record already made in this case,[5] we need only highlight the facts found to show that there is no merit to the claim that the findings are clearly erroneous. Concerning findings 16-20, the record shows White children living closer to Coolidge and Kennedy than to Roosevelt School were bused to Roosevelt, where only White pupils attended, and the busing was not justified by considerations of safety; no White pupils were bused to Coolidge and Kennedy and no Negro pupils were bused to the four schools outside of Phoenix. There was testimony that the busing program could be explained only in the aspect of the total racial segregation "which it produced."

In support of findings 21-23 the record shows that a referendum was conducted in the District in April, 1964 for the purpose of obtaining the District's authority for the construction of a new school. Residents were told the school would relieve crowding at Coolidge and Roosevelt, with resulting integration. The vote was against the proposal. The proposal for a new school was again submitted to a referendum in December, 1964, but this proposal required that the Kennedy School be located adjacent to Coolidge, and that the Taft School be built in the "White" area below Phoenix. This proposal, which continued the residential-based school segregation, was approved. One Board member testified that he took into consideration in the proposal subject of the referendum "the effect of an integrated school I felt would have an effect on the passage of the bond issue."

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[5] Twelve witnesses testified at the hearing on the preliminary injunction, and twenty-four witnesses at the hearing on the permanent injunction. Three witnesses, McGovern, Wiersma and Graff, testified at both hearings.

The record relevant to findings 24-34 shows that formal attendance zones were first drawn in 1964 and were again formalized in 1966 after Kennedy and Taft were built. Before these formal zones were drawn, White children outside of Phoenix attended Coolidge and its predecessor school in Phoenix, but several Phoenix Negro families were not permitted to enroll their children at Roosevelt. From 1956 to 1967 increasing numbers of White children living closer to Coolidge than to Roosevelt were assigned to and walked to Roosevelt.

The zones were drawn by a committee of Board members, two members of which asked to be appointed to make sure that only changes that "had to be made" would be made. And the three committee members told the president of the Board they wanted to keep Coolidge Negro. A recommendation of the committee indicated that one of the reasons for drawing the zones was that neighborhood schools were desirable and that neighborhood schools should serve a "like socio-economic level."[6]

Finally, as to findings 35-38 the record shows that Plan C's upper grade recommendation, *i.e.*, the education of seventh and eighth grade students at one location, was approved in principle by educators and Board members. There was testimony that Coolidge was the only school in the District large enough to accommodate all upper grade students, that it was better to have a center for these students instead of scattering them throughout the other schools, and that it was the most educationally sound proposal. And there was testimony—considered in the light of the foregoing testimony—which justified the inference that Plan C's recommendation of Coolidge as the upper grade center was rejected because of hostility of the residents of the District to desegregation.

We think there was ample support in these findings for the ultimate finding of fact that the pupils in School District 151 have been segregated on the basis of race,

[6] The plan of student assignment directed in the order before us was based upon a study of the District conducted by the Department of Health, Education and Welfare at the suggestion of the government and upon request of the defendants, in accordance with Section 403 of the 1964 Civil Rights Act, 42 U.S.C. § 2000c-2. This is approved procedure. *See Alexander v. Holmes County Board of Education*, 396 U.S. 1218 (1969).

the result of which has been a dual system of schools identifiable because of racial composition. We reaffirm our conclusion on the first appeal of this case that the district court was not clearly in error in finding the Board has practiced unconstitutional invidious discrimination with respect to student busing, selection of school sites, drawing of attendance zones and adoption of an educational structure for the District.

Here, as on the first appeal, much of defendants' arguments against the findings, relying again on *Bell* and *Deal*, presuppose that the defense testimony required the district court to find that because the racial pattern of the District was an innocent development, such racial descrimination and segregation was the result of innocent good faith performance of defendants in fulfilling their duties.

There is no merit to the Board's argument based upon financial difficulty of the District in implementing Plan I as ordered by the court. It is a matter of common knowledge that other school districts in Cook County, the Chicago Public School System, and the Illinois Legislature are suffering under the necessity of meeting expanding educational costs. We pointed out in our opinion in the first appeal that the claimed financial difficulty is no bar to enforcement of valid desegregation orders. The increased busing cost problems urged upon us are unpersuasive in the District which is but 4½ miles square and additional cost expected under the order is $15,000.[7]

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[7] Any reliance placed by the Board upon the recent *Swann, et al. v. Board of Education*, 39 L.W. 3364, is misplaced. Defendants argue that approximately 55% of the pupils in School District 151 are to be bused while in North Carolina's Charlotte-Mecklenburg school district, subject of the *Swann* case, less than 50% were to be bused and that nevertheless the court of appeals there vacated the district court's order. The court there decided the "board . . . should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system."

The school system there served a population of over 600,000 covering an area of 550 square miles with 84,500 pupils attending 106 schools. The district court's elementary school plan disallowed by the court of appeals would have required transporting 9,300 pupils in 90 additional buses with an average daily round trip of 15 miles through "central city and suburban traffic." The district court there estimated the additional cost for the first year at $1,011,200. The court applied the test of reasonableness in its disapproval. Applying the same test here the district court could well find Plan I requirements reasonable, with the exception as to K-2 children, noted later in this opinion.

In remanding the cause in its first appeal, this court stated that the burden would be upon the Board to present a plan which promised "meaningful and immediate progress toward disestablishing the existing unconstitutional discrimination." This was effectually a direction to disestablish the segregated school system and reform it into a unitary system. *See Alexander, supra.*

We see no sound basis for defendants' claim that the district court committed error in imposing upon them the burden of proving justification of their policies and decisions. We decided in the first appeal that the district court had an ample basis for fact findings which would justify a reasonable forecast that the government would ultimately prevail in this suit. We need not go beyond the objective, uncontrovertible facts to find again an ample basis for the similar findings before us. The record required defendants to go forward—after the government rested its case in chief—to show that the objective facts were not the result of the unconstitutional discriminatory policies and decisions of the Board. Turner v. Fouche, 38 L.W. 4090.

After this court's mandate issued in the first appeal, defendants offered substantially no plan of desegregation, and up to almost the end of the hearing after remand had not even inquired of the Superintendent of Schools with respect to a plan or to alternatives to those offered by the government. This situation in itself justified the district court's adoption of a government plan. *See Alexander, supra.* At the hearing the government presented two plans for desegregating the district. Defendants were "unwilling" to adopt either plan. The government plans were supported by testimony of those who had drawn the plans and proposed them. The court found that government Plan I was educationally sound, but would involve additional busing in 1969-70: the K-5 students from Kennedy and Coolidge would be bused to schools outside of Phoenix, and sixth, seventh and eighth grade students from outside Phoenix would be transported to Coolidge.

We approve the district court's order, with one exception. The court ordered that all students in grades 6-8 be assigned to the Coolidge-Kennedy complex as upper

grade center, with Eisenhower, Madison, Roosevelt and Taft serving grades K-5, and K-5 pupils residing in Phoenix assigned to Eisenhower, Madison, Roosevelt and Taft. We modify the order with respect to K-2 children. We are not disposed to compel transfer of Phoenix K-2 pupils unless parents of the children desire. There is nothing in the record which requires our approval of that part of the decree. In our opinion, the parents of these small children are best suited to determine whether it is more beneficial to the children to be close to home or bused to other schools. We think the busing of those children should be done only if their parents consent.[8]

We approve the district court's reservation of jurisdiction over the cause in order that it may require, and take, such action as from time to time may be needed to the end that the court's decree directed at undoing the effects of the unconstitutional segregation in School District 151 on the basis of race be fully complied with and without delay. See *Green v. County School Board,* 341 U.S. 430, 438 (1968), and *Alexander, supra.*

AFFIRMED AS MODIFIED.

No. 17754

DUFFY, *Senior Circuit Judge,* dissenting.

The opinion herein makes reference to the first appeal in this case wherein this Court affirmed the preliminary injunction issued by the District Court. However, no mention is made that our decision in the first appeal was by a divided court.

In my previous dissenting opinion, I invited attention to the fact that prior to the filing of the instant suit, complaint had been made to the Superintendent of Public Instruction for the State of Illinois which contained charges of segregation of Negro teachers and pupils in School District 151. Those charges were similar to the charges filed in the case at bar.

[8] This with some "amelioration" was a suggestion of the government according to the Joint Report filed with the court.

After hearing evidence, the Superintendent of Public Instruction rendered a decision in which he found ". . . a consideration of all evidence does not show that any child or teacher is segregated in or excluded from a particular school solely by reason of their race as charged in the petition."

I also pointed out that a similar complaint was made to the United States Department of Health, Education and Welfare (HEW), but that after an investigation by officials of that Agency, HEW informed the School Board it could see no pattern of wilful discrimination.

In a memorandum by the investigating officials which was addressed to the Assistant Commissioner in the Office of Education of the Department of Health, Education and Welfare, it was stated "There is no evidence of gerrymandering of the Coolidge-Kennedy boundaries as these zones are the same as they were when the school was predominantly White . . . . This situation seems to be a classical *de facto* segregation situation in which there are no elements of racial discrimination which come within the purview of Title VI. . . ."

On the previous appeal, the School District, in my opinion, properly complained that on July 8, 1968, the District Court adopted, without any change, the twenty-six pages of Findings and Conclusions, and a six-page Order submitted by the Government.

On the second hearing on the question of a permanent injunction, the trial court continued to display the same attitude, and on May 15, 1969, the District Court again, without changing a word, accepted the Government's seventy-three proposed Findings of Fact; the Government's thirty-three proposed Conclusions of Law, and the Government's proposed Order, in all some ninety-seven pages. There is no justification for such a procedure which has been strongly criticized by many courts. See *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651, 656-657 (1964). This practice would seem to indicate that in this case, the Government could do no wrong.

The School District also objects to the many instances of cross examination of its witnesses by the District Judge

which, it claims, was often done in a caustic and unfair manner.

In 1948, the City of Phoenix was a predominantly White community and the student enrollment at the Coolidge School was approximately 70% White. However, within the next eight years, due to an influx of Negroes who came to reside in Phoenix, the housing pattern was altered so that Phoenix became an almost exclusively Negro community. Reflecting this change, the enrollment of the Coolidge School at the start of the 1956-57 school year was approximately 99% Negro.

There is no evidence in the record that during the eight-year period starting in 1948, the School Board did anything to change the racial composition in the Coolidge School. Certainly, it cannot be denied that the attendance boundaries for Coolidge in 1956 were identical with those which existed in 1948.

One thing is obvious and beyond dispute, and that is that the failure to change school boundaries in 1964 could not, and did not play any part in Coolidge becoming a 99% Negro school during the period from 1948 to 1956.

Bell v. *School City of Gary,* 324 F.2d 209 (7 Cir., 1963) established the law in this Circuit pertaining to so-called de facto segregation. It is quite apparent that my two colleagues in this case are not happy with our holding in *Gary.* They seek to avoid applying the principles announced in that case by saying that *Bell* v. *Gary* ". . . and its progeny, including Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), *cert. den.* 389 U.S. 847 (1967), are not controlling here, where the segregation has been found to be de jure, . . ."

I emphatically disagree. We clearly held in *Gary* that no affirmative constitutional duty existed to change innocently arrived at school attendance districts by the mere fact that shifts in population had increased or decreased the percentage of Negro and White populations. That is the situation in the case now before us.

I feel it imperative to again point out that a petition for certiorari in the *Gary* case was denied. (377 U.S. 924 (1964)). Further, our opinion in *Gary* was followed by

the Tenth Circuit in *Downs* v. *Board of Education of Kansas City,* 336 F.2d 988 (10 Cir., 1965). A petition for certiorari in that case was denied. (380 U.S. 914 (1965)). Our decision in *Gary* was also followed by the Sixth Circuit in *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6 Cir., 1966). Again, certiorari was denied. (389 U.S. 847 (1967)).

I also deem it appropriate and indeed necessary to again note that when the Bill which later became the Civil Rights Act of 1964 was before the House of Representatives, it gave the Attorney General wide authority to file suits in any part of the country in order to force integration. However, the United States Senate adopted an amendment which was included in the Bill which became law and which provided "Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance. . . ."

In the Senate debate, Senator Humphrey who was in charge of the Bill, stated (110 Congressional Record, p. 12714) that the provision ". . . merely quotes the substance of a recent court decision which I have with me and which I desire to include in the Record today, the so-called Gary case." [Referring to *Bell* v. *Gary, supra*].

Thus, the principles which we announced in our *Gary* decision have been before the Supreme Court on three separate occasions. In each case a review of those principles we announced in *Gary* was denied. Furthermore, the Congress must have had our decision in mind when it passed the Civil Rights Act of 1964.

In my previous opinion on the first appeal, I pointed out the many important factors in *Gary* which are also present in the instant case. Among other conditions cited were—In 1961-1962 certain areas in Gary contained twelve schools where 99% to 100% of the students were Negroes. I stated "Here, all schools were integrated with at least one Negro teacher as was the case in Gary. Here, the safety factors were almost identical with those in Gary, such as many railroad tracks, main highways without

sidewalks, drainage ditches, etc." Also applicable on this appeal from the permanent injunction is my previous statement "In my view, the District Court's order requiring defendants to adopt Plan C and bus approximately 790 Negro and White children to achieve a certain 'racial make-up of each school' ignores not only our decision in Gary, but also ignores the Congressional intent in passing the Civil Rights Act of 1964, and the prohibition contained in Tit. 42, Section 2000 C-6, U.S.C." Furthermore, I do not believe the record before us justifies a finding of purposeful discrimination.

It was, of course, the duty of the trial judge to maintain throughout the trial an atmosphere of impartiality. Defendants strongly urge that there was a flagrant abuse of this obligation by the trial court, and that there was clearly a pre-judgment of the merits of the case.

The Government offers several excuses for the trial court's "occasional sarcasm", "caustic lash" and "judicial exasperation with defendants."

The Government urges that it was a long, tiring non-jury trial. However, the trial court's attitude was evident from the beginning of the trial. In fact, the opening statements by defendants' attorneys were repeatedly interrupted by the trial judge.

The District Court did not hesitate to order the busing of Phoenix (Kennedy School) K-2 children who are very young. However, my brothers on this panel announce in the majority opinion that they are not disposed to compel transfer of Phoenix (Kennedy School) K-2 pupils unless their parents so desire. They say—"In our opinion, the parents of these small children are best suited to determine whether it is more beneficial to the children to be close to home or bused to other schools." I agree with this statement. My only complaint is that it does not go far enough.

The majority opinion makes light of the increased cost of busing which is necessary under the plan approved by the District Court. The opinion states: "The increased busing cost problems urged upon us are unpersuasive in the District which is but 4½ miles square and additional cost expected under the order is $15,000."

During the first full year under the upper grade center ordered by the District Court, the school district was required to borrow $510,000 as compared to the total amount of $260,000 borrowed the previous year.

Furthermore, the busing costs last year were not met by the transportation tax levies, despite the fact that the School Board doubled the tax levy to 8 cents, the maximum permissible without a voter referendum. There was a deficit in the transportation fund at the end of last year of $16,500 which required the issuance of tax anticipation warrants against the transportation levy.

The plan adopted and the order of the District Court seem to ignore the desperate financial condition of School District 151. Illinois law provides that general obligation bonds, when approved by the voters, can be issued up to only 5% of the assessed valuation. Ever since this litigation was commenced, School District 151 has been and is about at the limit of its bonding power.

When Plan C was approved by the District Court's decision on the petition for a preliminary injunction, it meant that approximately 790 Negro and White children would have to be bused to achieve certain "racial makeup of each school."

Under the District Court's order on the Petition for a Permanent Injunction, the Government argued the busing of 55% of the total student body of the District is incidental to the establishment of unitary schools in the system. I disagree. The plan was actually drawn to overcome the effects of residential or *de facto* segregation and to integrate the student bodies of each of the six schools in School District 151. There was an arbitrary assignment of black students who resided in the City of Phoenix to each of the other schools in the District.

An illustration of the extremes included in the District Court's order as to busing is the requirement therein that ". . . Buses shall be routed so as to eliminate or consolidate those different lines which serve primarily white or primarily negro students. . . ."

It is apparent that the trial judge did not attempt to distinguish between "White" and "Negro" schools estab-

lished under the compulsion of state laws and those established by the operation of residential housing patterns. It would seem to have been the view of the trial judge that predominantly White and predominantly Negro schools are impermissible under the Constitution whatever the cause. I consider very appropriate a statement made by Chief Justice Burger in a concurring opinion in *Northcross et al.* v. *Board of Education of Memphis, Tennessee,* ..... U.S. ..... (1970) (38 L.W. 4220), wherein he stated ". . . however, we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."

It is quite true as the School District argues, that the inevitable effect of non-integrated residential patterns, whatever the reasons for their existence, have been to produce corresponding school attendance patterns without any need for official action. I think it follows that the existence of a predominantly Negro school in a bi-racial school district is of no probative value in showing any official acts of discrimination. In my opinion, there was no justification for the defendants being required to shoulder the Government's burden of proof.

I would reverse.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 17022 SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SCHOOL DISTRICT 151 OF COOK COUNTY, ILLINOIS, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 17, 1968

Before DUFFY, *Senior Circuit Judge,* KILEY and SWYGERT, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal by defendants from a preliminary injunction order in a civil rights action brought by the United States Attorney General under 42 U.S.C. § 2000 c-6-(a) to desegregate grammar schools in Illinois School District 151. We affirm the preliminary injunctive order for the government, and remand for further proceedings upon the government's motion for permanent injunction.

The District embraces parts of the cities of Phoenix, South Holland and Harvey—all in Thornton Township, Cook County, Illinois. Six schools are operated in the District: Madison, Taft, Coolidge, Roosevelt, Eisenhower

and Kennedy. Madison, Taft, Roosevelt and Eisenhower accommodate children from kindergarten through eighth grade. Coolidge serves children in third through eighth grades, and Kennedy, immediately adjacent to Coolidge, serves kindergarten through second grade.

Before the Roosevelt School was built in 1934, the only school in the District—then a sparsely populated farming area—was the Phoenix School, with a student body 95% White and 5% Negro. The Coolidge School was built in 1936, two years after the Roosevelt School, to replace the old Phoenix School. Constantly increasing population in the District required additions to Roosevelt and Coolidge and construction of four new schools, Madison in 1957, Eisenhower in 1960, and Taft and Kennedy, both in 1966. The Coolidge and Kennedy Schools are adjacent and are located in the northwest part of the District in the city of Phoenix; Taft is southwest of Phoenix in the city of Harvey; Roosevelt, Madison and Eisenhower are located in South Holland, in the area east of Phoenix.

While the population increases were uniform throughout the District, the increase of the Negro population in Phoenix changed the racial makeup of the Coolidge School, so that in 1948 the enrollment was 30% Negro and 70% White. Since the school year 1956-57, the enrollment at Coolidge, and since 1966 at Coolidge and Kennedy combined, has been about 99% Negro. Since no Negroes presently reside or have ever resided in the Harvey or South Holland area outside of Phoenix, the population of the area of the four schools, in that area, is "almost exclusively" White.[1]

Before this suit was filed, charges were made to the Illinois Superintendent of Public Instruction and the United States Department of Health, Education and Welfare, that the School District was deliberately pursuing the policy of segregating Negro pupils and teachers

[1] The defendant, Board of Education, in the last several years has conducted racially integrated educable mentally handicapped and trainable mentally handicapped District-wide programs, and also integrated District-wide summer schools.

from White schools on the sole basis that they were Negroes. The Superintendent and the Department both found that the evidence did not support the charges. This suit followed, seeking preliminary and permanent injunctions against racial segregation of pupils in the School District. After a lengthy hearing, the district court found substantially that "defendants and their predecessors" had failed to take steps to overcome the effects of past racial discrimination and had engaged in purposeful segregation policies and practices so as to segregate pupils on the basis of "race and color."[2]

The district court made detailed findings of fact which are for the most part unchallenged here. As ultimate facts the court found substantially that before 1964 defendants' predecessors had segregated Negro from White pupils on the sole basis of their being Negro; and that since 1964 defendants had by their policies and practices not only failed to overcome the unconstitutional discrimination of their predecessors, but had themselves, by their own policies and practices, continued to maintain unconstitutional segregation in the School District through decisions based solely on the fact that Negro pupils were Negro. The court found that these decisions consisted of formal drawing of attendance zones, bussing of pupils, assignment of teachers, location and construction of schools, and rejection of a plan for restructuring the School District. It concluded that this conduct of defendants and their predecessors violated the equal protection clause of the Fourteenth Amendment of the United States Constitution.

On July 8, 1968, the court concluded that the issuance of a preliminary injunction was appropriate and necessary because of the long time since the mandate of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown*, I), and to give defendants sufficient time before the beginning

[2] This term is somewhat ambiguous since, although no Negro pupils were regularly enrolled in any school in the area, outside of Phoenix, there is testimony that some Japanese children attended schools in that area.

of the 1968-69 school year to undertake compliance with the injunctive order.

That order directed the disestablishment of the Coolidge School as a "predominantly Negro" school by adoption of "Plan C[3] or by any other [similar] method"; to formulate a plan for disestablishment of the Kennedy School as a "predominantly Negro" school for the 1969-70 school year; to redraw school attendance zones for the Kennedy School; and to provide pupils of the Kennedy School for 1968-69 the right to apply for transfer to any school in the District at their grade where classes have fewer than thirty-four pupils. The order further directed defendants to begin filling teacher vacancies by assigning new teachers to positions in schools where "their race is in the minority," with the objective of eliminating, for the 1969-70 school year, identification of schools by teacher placement as either Negro or White. The defendants were further ordered to achieve 50% of this ultimate objective for the 1968-69 school year. If voluntary transfers or new hiring would not attain either the ultimate or the intermediate objective, the defendants were ordered to reassign presently employed teachers to reach the objective even though their contracts may have been executed for the 1968-69 or the 1969-70 school year. Defendants, under the order, were not to take action for construction of new facilities, or additions to existing facilities, without leave of court to insure that future construction will be guided by the objective of eradicating the effects of past segregation. The order directed defendants to submit to the court detailed plans for the disestablishment of the Coolidge and Kennedy Schools as "predominantly Negro" schools, not later than July 15 and October 15, 1968 respectively. The appeal before us is from that order.

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[3] Plan C is a plan which had been proposed by Superintendent Watts of School District 151 to restructure the School District. It called for an upper grade center at Coolidge for all the seventh and eighth grade pupils of the District. The pupils previously attending Coolidge would, under the plan, be distributed throughout the remaining District schools. Plan C was rejected by the School Board. See text, *infra*.

THE HEARING

The first contention of defendants is that they were denied a fair hearing because the court refused them adequate time to prepare their defense to the government's motion for preliminary injunction. There is no merit in this contention.

The Attorney General filed suit on April 25, 1968, and applied for the injunctive relief on May 27, 1968. Defendants answered on June 3, 1968. On June 13 the Attorney General moved for a preliminary injunction, and the court set a hearing for June 19, 1968. On June 17 defendants moved for sixty days' continuance. The motion was denied and the hearing proceeded from June 19 through July 2, 1968.

It is true that "voluminous" answers to defendants' interrogatories of June 3 were not filed until June 15. Nevertheless we see no abuse of discretion in denying the continuance. Defendants have not given us any good reason why they could not, after June 15 and until the hearing closed July 2, have prepared for their defense, nor have they shown what matter, specifically, was not offered that would have been had more time been available. Neither is there any showing that defendants requested delay, at any time before or after the hearing began, for less than sixty days. And a sixty days' continuance would have brought the hearing date to the middle of August, just a few weeks before commencement of the school year.[4]

THE MERITS

Defendants next contend that they have no constitutional duty to bus pupils, in the District, to achieve a racial

[4] The validity of the injunction before us is not defective because the court did not consolidate hearing of the motion for permanent injunction with that for the preliminary injunction. The court was not required to use its power under Rule 65(a)(2), FED. R. CIV. P. (1966) to consolidate the motions for hearing. Neither was the court required, on this record, to deny preliminary relief because the preliminary injunction virtually determined the ultimate issue. *Selchow Righter & Co. v. Western Printing & Lith. Co.*, 112 F.2d 430 (7th Cir. 1940).

balance. It is true that 42 U.S.C. § 2006 withholds power from officials and courts of the United States to order transportation of pupils from one school to another for the purpose of achieving racial balance. However, this question is not before us. Although we recognize that past residential segregation itself, in the District, severely unbalanced racially the school population, the district court's judgment is directed at the unlawful segregation of Negro pupils from their White counterparts which is a direct result of the Board's discriminatory action. Therefore, the district court's order is directed at eliminating the school segregation that it found to be unconstitutional, by means of a plan which to some extent will distribute pupils throughout the District, presumably by bus. This is not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the Board's history of discrimination.

The Constitution forbids the enforcement by the Illinois School District[5] of segregation of Negroes from Whites merely because they are Negroes. The congressional withholding of the power of courts in Section 2000 c-6 cannot be interpreted to frustrate the constitutional prohibition. The order here does not direct that a mere imbalance of Negro and White pupils be corrected. It is based on findings of unconstitutional, purposeful segregation of Negroes, and it directs defendants to adopt a plan to eliminate segregation and refrain from the unlawful conduct that produced it.

Defendants next contend, on authority of this court's decision in *Bell v. Gary,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964), that the district court's judgment is erroneous.

They argue that in the case before us a normal migration of Negroes into Phoenix produced a corresponding racial pattern of de facto segregation of Negro pupils in Coolidge and Kennedy Schools, and White pupils in

[5] No point is made that the School District's conduct was not state action.

the other four schools, and that there is no constitutional violation in the Board's "inaction" in the face of racial imbalance.

The *Bell* case, written by Judge Duffy, is a leading case on the question of neighborhood schools. The *Bell* neighborhood school doctrine, however, does not control our decision here. That doctrine, followed in *Deal v. Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967), and *Downs v. Board of Education,* 336 F.2d 988 (10th Cir. 1964), *cert. denied,* 380 U.S. 914 (1965), presupposes an "innocently arrived at" de facto segregation with "no intention or purpose" to segregate Negro pupils from White.[6] The court in *Bell* was speaking upon the facts in that case where the Negro plaintiffs' position was that they had a "right to be integrated in school" and that this right was a purpose which overrode considerations of safety and convenience of pupils and the costs of the operation of the school system. The district court in *Bell* had considered the safety, convenience and cost factors. It had found too that the attendance zone boundaries were determined without any consideration of race or color, and found, with this court's approval, that the boundaries had been "reasonably arrived at and that the lines have not been drawn for the purpose of including or excluding children of certain races." In the course of its opinion this court said that plaintiffs had no authority for the claim that the defendants in *Bell* had an affirmative duty to redraw boundary lines "for the purpose of mixing or blending Negroes and Whites in a particular school."

The nub of defendants' argument is that the de facto segregation pattern in Phoenix and the other cities within the School District came about innocently, and that under the *Bell* decision they have no constitutional duty to undo

[6] This court stated in *Bell*: "We agree with the argument of the defendants stated as 'there is no affirmative U. S. constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or White pupils.'" 324 F.2d at 213.

the innocent result. The weakness in this argument is that the district court did not find that defendants inherited an innocent de facto segregation situation, but found that they inherited from their predecessors a discriminatorily segregated school system which defendants subsequently fortified by affirmative and purposeful policies and practices which effectually rendered de jure the formerly extant de facto segregation. The court found invidiousness in these policies and decisions, in an unlawful discrimination by defendants and their predecessors both before and after February, 1964. We need not, therefore, consider defendants' argument that they had no duty to desegregate a purely de facto segregated school district. *Offerman* v. *Nitkowski,* 378 F.2d 22 (2d Cir. 1967). This is not a case of mere "inaction" under the court's finding of the unlawful actions of the Board.

But, defendants finally argue, the findings of purposeful, invidious, unconstitutional segregation are clearly erroneous as unsupported by substantial evidence in the record. We see no merit in this argument.

There is evidence that White pupils living in the area east and northeast of Phoenix attended Coolidge School from the 1920's to 1956 during the population shift from White to Negro. No later than 1956, White children living in this area, who were closer to Coolidge than to Roosevelt, were permitted to transfer and were bussed to Roosevelt. In 1956 Negro parents were denied permission to enroll their children in Roosevelt. It is not clear whether there were definitive attendance zones for Coolidge or Roosevelt at the time. If there were not, the Negro pupils were denied the freedom of choice between Coolidge and Roosevelt; if there were, it would seem that the boundary was observed only against Negro children. It was not until 1964 that attendance zone boundaries were first formalized for the District. They were modified, slightly, in 1966. On both occasions the zone for Coolidge, and in 1966 for Kennedy and Coolidge, included all of Phoenix but no other residential part of the District. The formal

attendance zone for Roosevelt included the area adjoining Phoenix on the east, from which White children living closer to Coolidge than to Roosevelt had, up to 1956, gone to Coolidge.

In addition to this objective evidence, there was testimony that in 1966 two of a three member committee to study attendance zone boundaries asked the Board president for appointment to the committee to make sure the boundaries "were not changed any more than they had to be"; and all members of the committee told the president they wanted to keep Coolidge Negro. A former Board president and the District Superintendent testified that the Board members had racial motivation in the drawing of the boundaries.

The government relies upon *Taylor v. Board of Education,* 294 F.2d 36 (2d Cir.), cert. denied, 368 U.S. 940 (1961), to sustain the inferences as to the unconstitutional conduct of defendants with respect to the attendance zones. Defendants seek to distinguish *Taylor,* on the ground that the government here failed to prove that the Board caused, or contributed to causing, Coolidge to be a predominantly Negro school. It is true that there is a factual difference in *Taylor.* There the 1930 Board had "carved out" a White area from one school district close to a school and put it in a district where the school was distant, and later replaced it when Negroes moved into the latter district. In the case before us the predominantly Negro Phoenix-Coolidge enrollment segregation was not originally created by the Board.

We see no difference, however, in principle between this case and *Taylor.* In *Taylor* the Board had changed from an earlier modified neighborhood school policy to a rigid neighborhood school policy in order to freeze a 94% Negro school. Here the Board's attendance zone policy was found to have purposefully frozen a Coolidge-Kennedy enrollment of 99% Negro children. In both cases, the Board was found to have drawn lines to effectuate and

perpetuate a purposeful, discriminatory condition, and race was made the basis for school districting, with the purpose and result of segregating public schools.

Before 1964, pupils living in Harvey Highlands adjacent to Phoenix on the southwest, much closer to Coolidge than to Roosevelt, were bussed to Roosevelt. Some White children living within walking distance of Coolidge and Kennedy were bussed to Roosevelt. The court found that this bussing policy was not based on a safety factor. In the years when the White population of Phoenix was greater then Negro, there could be no invidiousness attributed to this practice. However, considering the years following 1956, after the population shift had made Negroes a majority in Phoenix, that bussing practice could well have induced the district court to view it as racially motivated, since the court considered this together with evidence that there were vacant classrooms at Coolidge, and that Negro children had been denied admission to the all-White Roosevelt School.

Moreover, there is ample evidence regarding purposeful faculty segregation aimed at keeping "Negro schools" Negro and "White schools" White. The first Negro teacher in the District was employed at Coolidge in 1953. The number of Negro teachers employed at Coolidge gradually increased thereafter, while the rest of the schools had all-White faculties. In 1964 two teachers, one a music teacher and the other a substitute teacher, were the first Negro teachers assigned to teach throughout the District. Not until 1966 was a Negro assigned as a regular teacher in the District area outside of Phoenix. A White teacher was not assigned to Coolidge until 1967, when the first White teacher there shared her time with Kennedy School. She was also the first White teacher at Kennedy. In 1966-67 there were fifty-seven White and thirty-five Negro teachers employed throughout the District, but sixteen Negroes were assigned to Coolidge, and fifteen assigned to Kennedy.

In assigning presently employed teachers to vacancies, there is a corresponding disproportion. There were four vacancies in 1953-54 in the District outside of Phoenix, and in 1965-66 there were twenty-two vacancies. Yet no Negro teacher was assigned to a vacancy. Negroes were assigned to fill four of thirty-five vacancies in 1966 and in 1967 Negroes were assigned to three of thirty-two vacancies. At Coolidge and Kennedy, Negro teachers were assigned to thirteen of thirteen vacancies in 1965-66, to eleven of eleven vacancies in the following year, and to nine of ten vacancies in 1967-68.

Defendants contend, on authority of *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966), that the district court's finding that racial segregation motivated defendants in selecting sites for the new Taft and Kennedy Schools presupposes that the Board was constitutionally required to locate its new schools so as to further the cause of integration. The holding in *Deal* is that a Board has no constitutional duty to select new school sites to further the "sole purpose of alleviating racial imbalance that it did not cause." 369 F.2d at 61. That holding, considered in the context of the *Deal* opinion, is inapposite here, since we think the district court's finding was justified on the facts before us. We agree with the government that it does not follow from the absence of a duty to achieve racial balance that a Board may deliberately select sites to achieve racial segregation.

In February, 1964, the Board submitted a referendum to the District voters on construction of a school in Harvey Highlands to relieve crowded conditions at Coolidge and Roosevelt. The proposition lost. The majority of the Board attributed the loss to sentiments of voters against integration of Negro and White pupils. A referendum was submitted to the voters in December, 1964, for construction of a new school and an addition to Coolidge School. This referendum was approved by the voters, resulting in the construction of Taft, a "White" school and Kennedy, a "Negro" school, in Phoenix adjoining

Coolidge. Fundamental rights may not be submitted to voters, nor be made dependent on elections. *West Va. St. Bd.* v. *Barnette*, 319 U.S. 624, 638 (1943).

We agree with defendants, however, that the district court's finding that voters were racially motivated in the February and December, 1964, elections was clearly erroneous as without a substantial evidentiary basis. The court did find, however, that the sites for the two new schools were selected by the Board to preserve racial segregation. We agree with this finding. There is evidence that the Board accepted the recommendations of various Board members and acquiesced in sentiment of District residents that new construction outside of Phoenix remain all White.

In early 1967 a team of five educators recommended that one upper grade center for seventh and eighth grade pupils be established for the entire District, and the Board members agreed generally with the recommendation. Later the new Superintendent, Watts, submitted several plans for the purpose: one, for example, would maintain the status quo, one would locate the center at Roosevelt, and Plan C, favored by Watts, would locate the center at Coolidge and distribute Coolidge pupils in third to sixth grades throughout the District.

The court found that the Board, "reflecting community sentiment hostile to the desegregation" which Plan C would effect, rejected the plan. In so finding, the court did not accept defendants' testimony excusing Board rejection of Plan C on grounds of financial inability to implement the plan because of unsalability of previously authorized but unissued bonds. It thought that the School District had sufficient resources available to implement Plan C. Defendants challenge the finding.

There is no merit in defendants' argument that no discrimination resulted from the Board's rejection of Plan C since White and Negro students were affected equally by the decision. The point is that rejection, in the district court's finding, was not innocent or based on cost, safety,

convenience, or other rational basis, but merely because Negro pupils were Negro—a reflection of the resident hostility.[7] Testimony of a former Board president and of Superintendent Watts that in their view racial segregation was the basis of the Board's decision is also relevant here. The court could justifiably attribute rejection of Plan C, previously recommended by the Superintendent, to the same invidious racial segregation purpose it found present in the unconstitutional drawing of attendance zones, assignment of teachers and selection of sites for new schools.

We cannot say that on the facts recited above the ultimate fact findings on this record are clearly erroneous or that the district court's conclusions based thereon are erroneous. It follows that we approve the court's conclusion that the conduct of the Board in assigning teachers on the basis of race, drawing attendance zones, bussing students, and in selecting school sites to preserve segregation was unconstitutional state action enforcing segregation of Negro from White pupils solely on the basis of their being Negro, and therefore violative of the Fourteenth Amendment. *Brown v. Board of Education,* 347 U.S. 483 (1954) (*Brown I*).

We reject defendants' argument that the government, having failed to prove unconstitutional conduct, resorted improperly to dependence upon psychological motivations of the Board. In the first place the government did not fail to adduce the necessary substantive proof, and in the second place dependence on motivation is not improper. In *Griffin v. School Board,* 377 U.S. 218, 231 (1964), the Court noted the objective arrangement of closing public schools and operating private schools with state and county financial aid was constructed for "one reason and one reason only," unconstitutional segregation. Invidious con-

[7] There is no doubt that Board members were under severe pressure from District residents and that performance of duty was made difficult. But this cannot excuse the unconstitutional conduct justifiably found on this record.

duct is made so because of human psychology involved in the process of unconstitutional discrimination. As we have already pointed out, the unconstitutional purpose of the Board members is a prime distinction between this case and *Bell* v. *Gary, supra.* See also *Offerman* v. *Nitkowski,* 378 F.2d 22 (2d Cir. 1967); *Wanner v. County School Bd.,* 357 F.2d 452 (4th Cir. 1966).

THE INJUNCTION

The district court, having concluded that the preliminary injunction was appropriate and necessary, entered the July 8 order covering, in general: I, Faculty Desegregation; II, Student Desegregation; III, New Construction; IV, Reports. On July 16, 1968, defendants filed Defendants' Plan Pursuant to Preliminary Injunction Order. Plaintiffs responded with Objections to Plan. And on July 22, 1968, the court, without hearing testimony, but hearing arguments of counsel, entered its supplementary order sustaining the objections to defendants' alternate plans and entered a detailed order implementing to a considerable extent Plan C. The portions of Plan C incorporated in the order were the location of the upper grade center at Coolidge, the distribution of Coolidge pupils in grades third through sixth among Roosevelt, Madison, Eisenhower and Taft, with the Kennedy School to serve grades kindergarten through second, and adopting the attendance zones substantially as formalized in 1966. It is needless to discuss the order at greater length.

We need not pass upon the defendants' objections that the supplementary orders entered July 8 and July 22, 1968, directed "hasty" and "ill-considered" solutions. The July 8, 1968, and supplementary orders, are with respect to the preliminary injunction.[8] Still pending in the district court is the government's motion for a permanent injunction. Nor will good purpose be served now by criticism

[8] No appeal was taken from the July 22 order, but the district court certified to this court the record of the proceedings, *inter alia,* relating to that order.

or approval of the preliminary injunctive directions which presumably have to some extent been followed by defendants under the compulsion of the orders of July 8 and July 22, 1968. What has been done has been done. The important issue now is on the prayer for permanent injunction and a resolution of the issue should be made in the district court at the earliest practical time so that an orderly, reasonable transformation of School District 151 be accomplished for the 1969-70 school year.

The hearing on the permanent injunction issue will be plenary. We merely suggest considerations of our own and of other courts that pertain to the decision on the issues. The Plan C upper grade center at Coolidge was recommended by Superintendent Watts. The team of educators recommended that the center be located at Taft. Plan C has been implemented more or less as a preliminary step gathering relevant practical experience. At the hearing both sides may call, and the district court may hear, or call, experts with respect to either of these recommendations or alternatives. There should be evidence with respect to the factors of safety, convenience of pupils and parents, and costs to and resources of the School District. The ideal solution should be considered with these factors in mind and should be aimed at the goal of eliminating "root and branch" segregation of Negro children from White on the sole basis of being Negro. *Green v. County School Bd.*, 391 U.S. 430, 438 (1968). Considerations of racial factors in undoing unconstitutional segregation are permissible. *Wanner v. County School Bd.*, 357 F.2d 452 (4th Cir. 1966).

Defendants have the burden, in view of the district court's July 8, 1968, order, of presenting a plan which "promises meaningful and immediate progress toward disestablishing" the existing unconstitutional discrimination. *Green v. County School Board,* 391 U.S. at 439; *Northcross v. Board of Education,* 333 F.2d 661 (6th Cir. 1964).

In the *Brown II* case, *Brown v. Board of Education,* 349 U.S. 294 (1955), the Court said, at 300-01, that with respect to desegregating a school system, lower courts "may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."

There is no hard and fast rule that tells at what point desegregation of a segregated district or school occurs. The court in *Northcross* said the "minimal requirements for non-racial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right. 333 F.2d at 662. On the other hand, "The law does not require a maximum of racial mixing or striking a rational balance accurately reflecting the racial composition of the community or the school composition." *United States v. Jefferson County Board,* 372 F.2d 836, 847, n.5 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967). The district court's judgment here must be made upon a determination whether defendants—by what they have done since the beginning of the 1968-69 school year, under the July 8 and July 22, 1968, orders—have shown a good faith performance, and whether the plans they may submit hold promise of future good faith performance toward achieving a non-racially structured school system which is reasonably related to the objective of the court's order. A final caution should be added with respect to a "freedom of choice" plan, or a "free transfer plan." These have been held to be constitutionally unacceptable where there are other more effective means to achieve desegregation of a school system. *Green v. County School Board,* 391 U.S. 430 (1968), and *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968), respectively.

We affirm the determination of the district court that defendants and their predecessors are guilty of denying Negro children in District 151 equal protection of the law in violation of the Fourteenth Amendment by virtue of the defendants' invidiously discriminatory policies, decisions and practices based solely on the fact that the children are Negroes. We further affirm the district court's preliminary injunction order and remand the cause to the district court for further proceeding upon the government's motion for permanent injunction.

No. 17022

DUFFY, dissenting. I respectfully dissent. I do not believe this important case should have been tried and decided on a motion for a preliminary injunction. I have understood that it is the purpose of a preliminary injunction to maintain the status quo. Certainly, the opposite procedure was followed in the trial of this case.

It should be noted that prior to the filing of the instant suit, complaint had been made to the Superintendent of Public Instruction for the State of Illinois, containing charges of segregation of Negro teachers and pupils in School District 151, similar to those presented in the case at bar. After hearing evidence, the Superintendent of Public Instruction, May 26, 1966, rendered a decision in which he found "a consideration of all evidence does not show that any child or teacher is segregated in or excluded from a particular school solely by reason of their race as charged in the petition."

A similar complaint was made to the United States Department of Health, Education and Welfare. Three officers of that Agency investigated the conditions in School District 151, and on November 22, 1966, informed the School Board of that District they could see no pattern of wilful discrimination against pupils or teachers and that they would so report to their office in Washington and to the Department of Justice.

The Government filed its original complaint on April 25, 1968. This complaint sought only the desegregation of the faculty of School District 151. The amended complaint which was filed on May 27, 1968, sought desegregation of both faculty and students in School District 151. On June 14, 1968, the Government filed a motion for a preliminary injunction. Over the objection of defendants, the motion was set for hearing only five days later. The defendants asked the Court to continue the hearing on the temporary injunction in order to give them sufficient opportunity to prepare their defense. This motion was denied, and trial was commenced on June 19, 1968. In my view, this rush act was not justified especially in view of the fact that it was the Government which, after a long investigation, delayed the filing of the amended complaint until May 27, 1968.

Throughout the hurried trial, the Government contended that the School Board of District 151, by a series of discriminatory decisions, resulted in the establishment of the Coolidge School as a "predominantly Negro" school. The Government's proposed findings and conclusions in this respect were accepted verbatim by the trial court. Apparently little, if any consideration was given to the factor of residential or de facto segregation.

In 1948, the Coolidge School had an enrollment of 70% white. In 1956, Coolidge had become a predominantly Negro school with a student enrollment of 99% Negro. There is absolutely no evidence in this record that during this eight-year period, the School Board did anything to change the racial composition in the Coolidge School. The attendance boundaries for Coolidge in 1956 were identical with those which existed in 1948.

It seems obvious that the failure to change boundaries in 1964 could not and did not play any part in the Coolidge School becoming a 99% Negro school during the period from 1948 to 1956.

Bell v. *School City of Gary*, 7 Cir. 324 F.2d 209 (1963) established the law in this Circuit pertaining to so-called

defacto segregation. In *Bell,* we held that no affirmative constitutional duty existed to change innocently arrived at school attendance districts by the mere fact that shifts in population had increased or decreased the percentage of Negro or white populations.

A petition for certiorari in the *Bell* case was denied. 377 U.S. 924. Our opinion in *Bell* was followed by the Tenth Circuit in *Downs* v. *Board of Education of Kansas City,* 336 F.2d 988 (1965). A petition for cetiorari in that case was denied. 380 U.S. 914. Our *Bell* decision was also followed by the Sixth Circuit in *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (1966). Certiorari was again denied, 389 U.S. 847 (1967).

When the Bill which later became the Civil Rights Act of 1964 was before the Houre of Representatives, it gave the Attorney General wide authority to file suits in any part of the country in order to force integration. The Senate, however, adopted an amendment which was included in the Bill and which became law, which provided "Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance. . . ."

In the discussion on the Senate Floor, Senator Byrd of West Virginia addressed Senator Humphrey who was in charge of the Bill asking: "Can the Senator from Minnesota assure the Senator from West Virginia that under Title VI, school children may not be bussed from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the school" Senator Humphrey replied: "I do." He further stated that the provision "merely quotes the substance of a recent court decision which I have with me and which I desire to include in the Record today, the so-called *Gary case.*"[1]

[1] 110 Congressional Record, page 12714.

Thus, we have the situation where the principles announced in our *Gary* decision were brought before the Supreme Court on three separate occasions when request for certiorari was made, but in each instance, a review of our decision was denied. We also know that the attention of the United States Senate was specifically directed to our decision in that case.

The majority opinion does make mention of the *Bell* case but says it does not control our decision here. Yet, there are many important factors which are similar.

In 1950, the population of Gary was 133,911 which included 39,326 Negroes. In 1960, the population was 178,320 of which 69,340 were Negroes. In 1961-62, in certain areas of Gary, twelve schools had 99 to 100% Negro students. A very similar situation existed in the city of Phoenix in School District 151 where the Coolidge and Kennedy Schools are located. It is undisputed that in the short period of eight years, the City of Phoenix changed from a predominantly white to a predominantly Negro community.

In the case before us, the School Board followed the neighborhood school concept although the Negro population was concentrated in one portion of the School District as was the case in Gary. Here, all schools were integrated with at least one Negro teacher as was the case in Gary. Here, the safety factors were almost identical with those in Gary, such as many railroad tracks, main highways without sidewalks, drainage ditches, etc.

The majority opinion as well as the District Court seemed to place great confidence in Plan C. This was a proposal of Superintendent Watts. His impartiality and judgment might be questioned. The evidence showed he referred to residents of South Holland (In School District 151) as "the old Dutch" and "Chicago grasshoppers" because they were "one jump ahead of the plague as they hopped from area to area." The suggestion is made that these remarks were on a "confidential" tape. Whether or not that be so, they were well publicized before the ref-

erendum was held seeking to increase the educational tax rate. This referendum was held shortly after the publication of this tape. The vote at the referendum was 1115 "No" and 477 "Yes."

In my view, the District Court's order requiring defendants to Adopt Plan C and bus approximately 790 negro and white children to achieve a certain "racial make-up of each school" ignores not only our decision in Gary, but also ignores the Congressional intent in passing the Civil Rights Act of 1964, and the prohibition contained in Tit. 42, Section 2000 C-6, U.S.C.

The order of the District Court also seems to have ignored the desperate financial condition of School District 151. Under Illinois law, general obligation bonds, when approved by voters, can be issued up to only 5% of the assessed valuation. School District 151 has been and is about at the limit of its bonding power.

I cannot agree with the novel constitutional theory urged by the Government to the effect that a constitutional violation depends not upon the effect of the actions of the School Board, but upon its psychological motivations. I understand the majority opinion does not agree with the District Court's finding that voters were racially motivated in the February and December 1964 elections.

APPENDIX C

ADDENDUM

Excerpts From
1964 CIVIL RIGHTS ACT
(Tit. 42, Sections 2000c, et seq. U.S.C)

§ 2000c. Definitions

As used in this subchapter—

(a) "Commissioner" means the Commissioner of Education.

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

(c) "Public school" means any elementary or secondary educational institution, and "public college" means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

(d) "School board" means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system. Pub.L. 88-352, Title IV, § 401, July 2, 1964, 78 Stat. 246.

§ 2000c—6. Civil actions by the Attorney General—Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial bal-

ance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue by order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney Gen-

eral may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

§ 2000c—8. Personal suits for relief against discrimination in public education

Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education. Pub.L. 88-352, Title IV, § 409, July 2, 1964, 78 Stat. 249.

§ 2000c—9. Classification and assignment

Nothing in this subchapter shall prohibit classification and assignment for reasons other than race, color, religion, or national origin. Pub.L. 88-352, Title IV, § 410, July 2, 1964, 78 Stat. 249.